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**TRANSCRIPT OF RECORD**

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1938**

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**No. 247**

**THE UNITED STATES, PETITIONER**

**vs.**

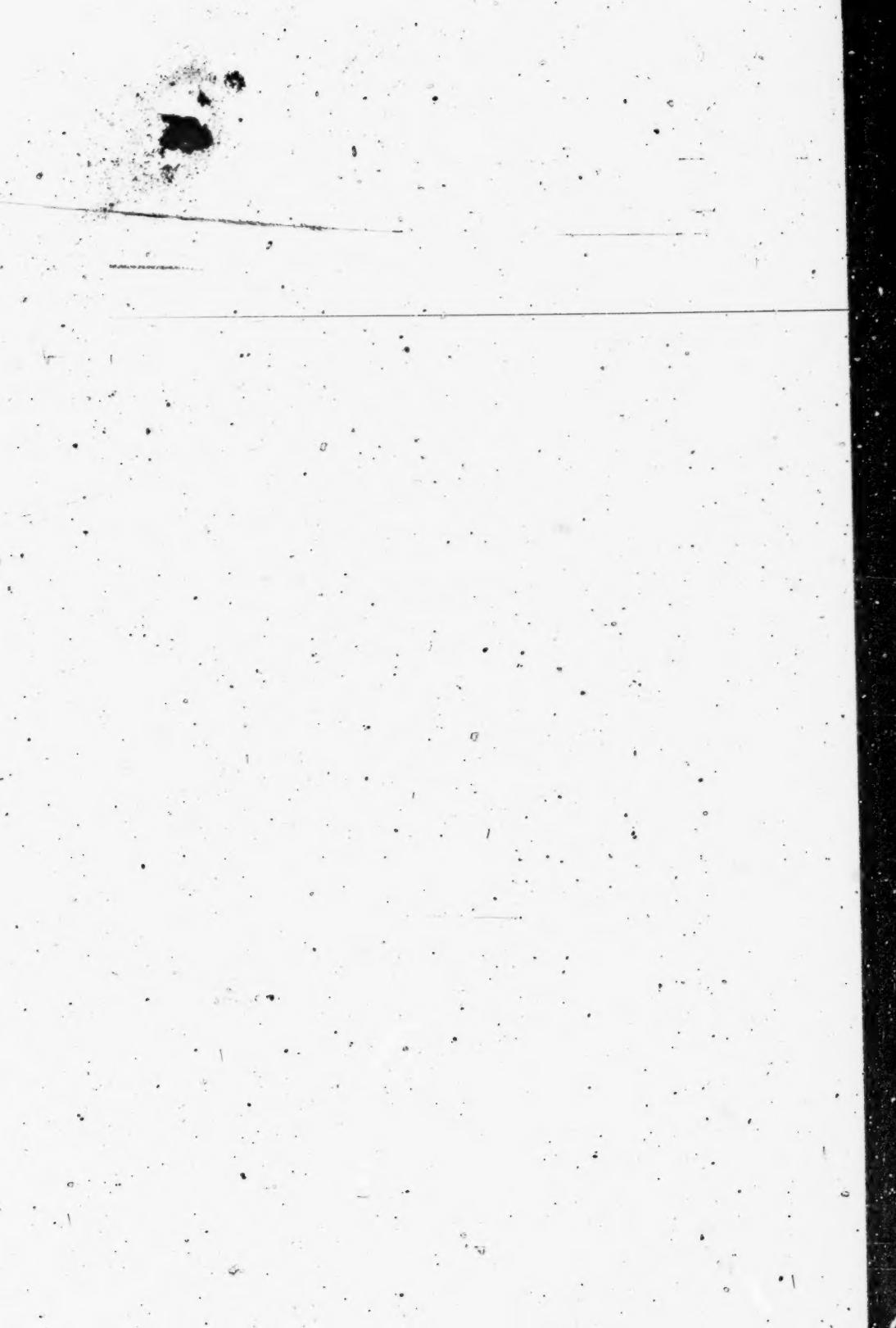
**LAMM LUMBER COMPANY**

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**ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS**

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**PETITION FOR CERTIORARI FILED AUGUST 2, 1938  
CERTIORARI GRANTED OCTOBER 10, 1938**



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 247

THE UNITED STATES, PETITIONER

vs.

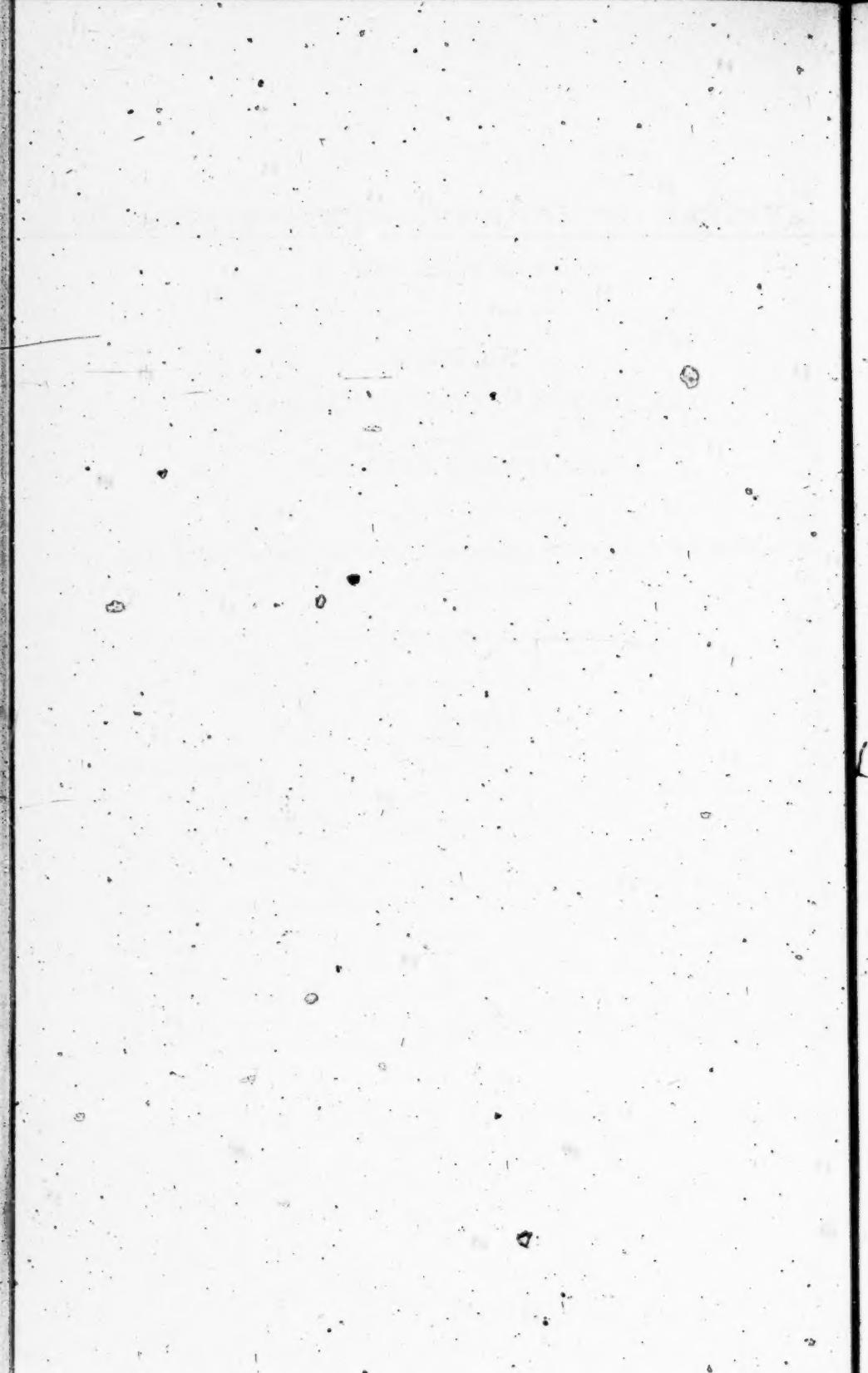
LAMM LUMBER COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

FILED AUGUST 2, 1938

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In the Court of Claims

No. K-533

LAMM LUMBER COMPANY

v.

THE UNITED STATES OF AMERICA

**I. Petition**

Filed December 11, 1929

TO THE HONORABLE CHIEF JUSTICE AND JUDGES OF THE COURT OF  
CLAIMS:

The Petitioner, Lamm Lumber Company, sues the Defendant, The United States of America, and for its cause of action alleges and says as follows:

**FIRST COUNT****I**

Petitioner, The Lamm Lumber Company, is a Corporation duly organized and existing under the Statutes of the State of Oregon, and has its principal office at Modoc Point, State of Oregon, and brings this action through and under its duly constituted Attorney, Ralph H. Case, 900 National Press Building, Washington, D. C., whose authority is set out in a Power of Attorney filed with this Petition.

**II**

That Petitioner, Lamm Lumber Company, entered into into contract and gave bond for performance on or about August 27th, 1917, with the United States of America, Defendant herein, for the purchase of the timber on a certain tract of land, known and designated as the Southern Mt. Scott Unit, on Klamath Indian Reservation, in the State of Oregon, a copy of which said contract and bond is attached hereto and is prayed to be taken and read as a part hereof, and is marked "Petitioner's Exhibit A."

**III**

The aforesaid contract included within the boundaries of the land therein described, and from which Petitioner was authorized and obligated to cut and remove certain timber in accordance with the terms thereof, the following described tract of land, to-wit:

"The northeast quarter of Section 30, Township 33 South, Range 7, East Willamette Meridian, Klamath County, Oregon."

## IV

That the above last described tract of land had been, prior to the execution of said contract, allotted to a certain Indian by the name of John Cole, Jr., who was, at the time of the making of the said contract, a minor and under the guardianship of Defendant herein, and a Trust Patent had been issued in the name of John Cole, Jr., under which the United States held the legal title in trust for said John Cole, Jr.

## V

That under and by the terms of the contract between Petitioner and Defendant, Petitioner was charged and obligated with the duty of making and entering into a contract with the allottee, John Cole, Jr., but by and through his father and natural guardian, and under the supervision of and approval by the Superintendent of the Klamath Indian School and Agency of Defendant, and further upon the approval by the Commissioner of Indian Affairs, said provision of the contract aforesaid, being as follows:

"The sale area includes 23 allotments comprising approximately 3600 acres, as to which the purchaser agrees to enter into separate contracts with the Indians who desire to sell and to pay to such Indians ten per cent of the estimated value of the timber on each allotment within thirty days from the approval of the contracts, it being understood and agreed that this contract merely authorizes the purchaser to enter into contracts with the individual Indians for the timber on allotments within the sale area, at the prices fixed for the unallotted lands."

## VI

That on or about the 24th day of June, 1918, Petitioner entered into a contract under authority of the Act of Congress of June 4 25th, 1919 (36 Stat. 855, 857), with one John Cole, father and natural guardian of John Cole, Jr., a minor, and Indian, under the jurisdiction of the Superintendent of the Klamath Indian School, allottee to whom had theretofore been issued a Trust Patent, as aforesaid, for the above-described northeast quarter of Section 30, Township 33 South, Range 7, East Willamette Meridian, Klamath County, Oregon; whereby and whereunder Petitioner purchased from said Indian all of the standing timber on the aforesaid described tract, which came within the provisions of Petitioner's said contract with Defendant herein, at a price and under condition in said contract set out, a copy of which contract is attached hereto, and prayed to be taken and read as a part hereof, and marked "Petitioner's Exhibit B."

## VII

That the contract between Petitioner and John Cole, fathe and natural guardian of John Cole, Jr., minor, the allottee aforesaid, was duly approved by Acting Commissioner of Indian Affairs E. B. Merritt, on July 18th, 1918, in compliance with the terms of Petitioner's contract (Exhibit A) with Defendant, and that in accordance with Petitioner's Prime Contract, and the subordinate contract made in behalf of John Cole, Jr., Petitioner, paid to Defendant the sum of six hundred and fifty dollars (\$650.00).

## VIII

That subsequent to the making of the contract between Petitioner and Defendant, and subsequent to the making of the subordinate contract between Petitioner and the Guardian of John Cole, 5 Jr., the said John Cole, Jr., died, and thereafter under the authority of the Act of June 25th, 1910, 36 Stats. L. 855, the Secretary of the Interior officially determined the heirs of said decedent, John Cole, Jr., which said finding recites that the father of decedent, to-wit: John Cole, was the sole heir of decedent.

## IX

That thereafter John Cole, father of decedent, John Cole, Jr., applied for a patent in fee to the aforesaid land, heretofore allotted as Allotment 1011, to the aforesaid John Cole, Jr., and that Defendant herein, through its duly constituted officers, thereupon issued to John Cole as sole heir of John Cole, Jr., a patent in fee simple to the above-described land, without regard for the servitude with which said land was burdened by Petitioner's contract with Defendant, (Exhibit A), and Petitioner's subordinate contract with said identical John Cole (Exhibit B), in consequence of which, the said John Cole (Sr.), without regard for Petitioner's rights, became and was possessed of a record title in fee simple to the above-described land.

## X

Thereafter the said John Cole (Sr.) sold the above-described land and conveyed the same into one Luke B. Walker, and that the said Luke B. Walker shortly thereafter served notice on Petitioner herein, the Lamm Lumber Company, that he was the owner of the above-described land, and as well the timber thereon, and said Walker 6 demanded of Petitioner herein that it either pay him, the said Walker, for the timber hereon, or that it (Petitioner) refrain from cutting timber on said described land.

## XI

Petitioner thereupon notified the Bureau of Indian Affairs, Department of the Interior, of the facts above recited, and said Bureau

UNITED STATES VS. LAMM LUMBER CO.

demanded of Petitioner and required of it that it proceed to the cutting of and payment for the timber on the above-described land, and said Bureau insisted and demanded that Petitioner comply strictly with its contract (Exhibit A), and its subordinate contract (Exhibit B).

XII

Petitioner was then and subsequently remainder under bond for the explicit performance of its contract with Defendant (Exhibit A), and was compelled by the terms thereof, to cut and remove the timber covered by, and included in its contract with Defendant (Exhibit A), which Petitioner did thereafter proceed to do and did cut and market the timber on the aforesaid tract of land, and in the regular course of business, and in accordance with Petitioner's contract with Defendant, did pay for the said timber in accordance with Petitioner's contract with Defendant.

XIII

That the aforesaid Luke E. Walker, claiming title from the aforesaid John Cole (Sr.), filed suit against Petitioner herein for 7 treble damages under Section 346 of the Code of Laws of the State of Oregon, which reads as follows:

"Whenever any person shall willfully injure or sever from the land of another any produce thereof, or shall cut down, girdle, or otherwise injure, or carry off any tree, timber, or shrub, on the land of another person, or on the street or highway in front of any person's house, village, town or city lot, or cultivated grounds, or on the common or public grounds of any village, town, or city, or on the street or highway in front thereof, without lawful authority, in an action by such person, village, town, or city, against the person committing such trespasses, or any of them, if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed or assessed therefor, as the case may be; provided, that in any such action, upon plaintiff's proof of his ownership of the premises and the commission by the defendant of any of the aforesaid mentioned acts, it shall be prima facie evidence that such acts were done and committed by defendant willfully, intentionally, and without plaintiff's consent. (L. 1925, c. 14, p. 24.)"

XIV

That Petitioner by the aforesaid wrongful action of Defendant, was put in jeopardy, to the extent of three times the value of the timber cut and removed from the aforesaid land, and that the said Walker claimed and alleged in his said suit that he was in fact and in law a bona-fide purchaser without notice of the existence of the aforesaid contract between Petitioner and Defendant, and the subordinate contract between Petitioner and John Cole (Sr.).

## XV

That Defendant, although requested, declined to intervene in said action and wholly neglected to defend the Petitioner's title to the timber on the land hereinabove described. WHEREUPON, upon advice of counsel, Petitioner settled with the aforesaid Luke E. Walker by payment of the sum of fifteen thousand dollars (\$15,000.00).

## XVI

Petitioner upon the first notice to it that the record title to the said timber was no longer in John Cole, Jr., but as a matter of record was in the aforesaid Luke E. Walker, notified Defendant, through its instrumentality, the Bureau of Indian Affairs, which Bureau thereupon and thereafter withheld payment from John Cole (Sr.), sole heir of John Cole, Jr., for timber cut and removed from the aforesaid described land, all of which said timber, under the contract (Exhibit A) has heretofore been removed, and valued, and paid for by Petitioner in the sum of twelve thousand, eight hundred sixty-nine dollars, thirty-one cents (\$12,869.31).

## XVII

Thereafter the Defendant, upon demand, returned to Petitioner herein the sum of eleven thousand, one hundred eighty-nine dollars, seventy-seven cents (\$11,189.77), but did not return to Petitioner the advance payment of six hundred fifty dollars (\$650.00) above referred to, and further deducted from the payments made by Petitioner to Defendant, the amount of eight percentum (8%) of the gross value of logs removed from the said quarter section, to-wit: one thousand twenty-nine dollars, fifty-four cents (\$1,029.54).

That, by reason of the negligence, wrongful acts of Defendant in issuing to the aforesaid John Cole (Sr.), a patent in fee without noting thereon a servitude under which said land then labored, the Petitioner herein, by reason of the acts of Defendant, has expended over and above restitution by Defendant, the sum of three thousand eight hundred ten dollars twenty-three cents (\$3,810.23), and in addition thereto, has been put to certain necessary expenses which Petitioner has paid as follows, to-wit:

Attorney fee to Manning, McCulloch, and Driscoll	\$1,000.00
Telephone calls (long distance) and telegrams paid by Manning, McCulloch & Driscoll, and which we have reimbursed them	7.20
Appearance fee to Clerk	5.00
1926, RRR. Garage, auto hire on Reservation	15.80
3-23-28 Continuation of Abstract op NE $\frac{1}{4}$ of 30-33-7	5.00
4-6-28 Witness fees and mileage to John Cole	23.00
4-7-28 to County Clerk for certified copies of deeds	2.75
4-17-28 Sheriff's fee in serving subpoena	3.60
6-18-28 Recording Satisfaction of Mortgage	.60
6-18-28 Recording Deed from Walker	.80
 Total	 \$1,063.75
In all \$4,873.98	

For which sum Petitioner prays judgment against Defendant as hereinafter set out.

10

SECOND COUNT

## XVIII

Petitioner further alleges that the aforesaid contract of August 27th, 1917 (Exhibit A), provided the amount in dollars which Petitioner was required to pay to the Superintendent of the Klamath Indian School, State of Oregon, for the timber cut and removed under said contract; in the following language, to-wit:

"For and in consideration of the foregoing Lamm Lumber Co., party of the second part, agrees to pay to the Superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians, the full value of the said timber, as shall be determined by the actual scale of the timber as it shall be cut, at fixed rates per thousand feet board measure Scribner Decimal C. scale, which rates for the specified periods of the contract shall be as follows:

"For the period ending March 31st, 1920, Three dollars and twenty-five cents per thousand feet board measure for yellow pine (including so called bull pine) and sugar pine, and fifty cents per thousand feet board measure for white fir.

"For the three year periods of the contract term beginning April 1, 1920, April 1, 1923, April 1, 1926, and April 1, 1929, such prices per thousand feet board measure for each species as shall be fixed by the Commissioner of Indian Affairs in the manner hereinafter described.

11      'It is agreed between the parties to this contract that the rates to be designated by the Commissioner of Indian Affairs for each of the said three year periods after April 1, 1920, shall be determined after a careful consideration of the cost of logging operations and of lumber manufacturer in comparison with the prevailing market prices for timber products in the Southern Oregon and Northern California region during the three years preceding January 1 of each year in which each new schedule of prices is fixed. Although the determination of the new rates shall lie wholly within the discretion of the Commissioner of Indian Affairs, a hearing will be afforded the purchaser upon request presented at least thirty days before the date upon which the new stumpage rates are to become effective for any period. The new schedule shall be determined and notice thereof given the purchaser on or before February 1, 1920, February 1, 1923, February 1, 1926, February 1, 1929.

'It is agreed further that the advance in stumpage rates as determined at the close of each specified period shall not exceed fifty per cent of the increase in the average mill run wholesale net value of lumber at mills in Southern Oregon and Northern California during the three

years preceding January 1, of the year in which the new prices are fixed.

As a basis for comparison in a readjustment of prices as above specified, it is stipulated by the parties hereto that the average mill run wholesale net values per thousand feet f. o. b. at mills in Southern Oregon and North California at the beginning of the three year period which is to end on January 1, 1920, are Fifteen Dollars and Seventy-five cents (\$15.75) for yellow pine (including bull 12 pine and sugar pine, and thirteen dollars and fifty cents (\$13.50) for white fir.)

"Under the last above quoted provisions of the aforesaid contract, the Commissioner of Indian Affairs gave notice and did fix the price of said timber, which price became effective April 1, 1923, and correspondingly did give notice and did fix the price of said timber, under said contract, which became effective April 1, 1926, and that the fixing of the price as of the date of April 1, 1926, under and in accordance with the terms of the contract, said price remained established and could not be changed by the Commissioner of Indian Affairs, until, and upon due notice, and not before April 1, 1929."

## XIX

That during the three years preceding January 1, 1928, there was no increase in the average mill run wholesale net value of lumber at mills in Southern Oregon and Northern California, neither was there any such increase during the three years preceding January 1, 1929.

## XX

Notwithstanding the prohibitions and conditions contained in said contract, and alleged in the last two paragraphs hereof, the Commissioner of Indian Affairs did on April 1, 1928, arbitrarily, and without excuse or justification, and in violation of the aforesaid contract of August 27th, 1917, by his order, increase the price per thousand board feet of timber cut and removed by Petitioner, in the sum of forty cents (\$.40) over and above the contract price as established April 1, 1926, for each one thousand board feet of timber cut and removed by Petitioner, so that in addition to the said established price, Petitioner was ordered to pay the increase of forty cents (\$.40) per thousand board feet, and said increase in price was enforced from and after April 1, 1928, to and including April 30th, 1929, during which period Petitioner cut and removed thirty million, three hundred fifteen thousand, nine hundred eighty (30,315,980) board feet of white pine, and twenty-nine thousand, one hundred sixty (29,160) board feet of other species. There was charged against and collected from Petitioner herein, the over charge of forty cents for each one thousand feet board measure of pine, i. e., a total of twelve thousand, one hundred twenty-six dollars, thirty-nine

cents (\$12,126.39) was collected from Petitioner in violation of its said contract, which sum, Defendant retains, and although restitution thereof has been demanded by Petitioner, the Defendant has refused and still refuses to return to the Petitioner the said sum so unlawfully collected from it.

Wherefore, petitioner prays judgment against Defendant in the amount of twelve thousand, one hundred twenty-six dollars, thirty-nine cents (\$12,126.39), as hereinafter set out.

## XXI

Petitioner further alleges that it is the sole owner of the above claim, that no assignment or transfer of the same, or any part thereof 14 has been made, that Petitioner is justly entitled to the total amounts claimed in Counts One and Two hereof, to-wit:

\$ 4,873.98 in Count One,  
12,126.39 in Count Two, a total of

\$17,000.37,

from the United States. Defendant, hereinafter allowing all just credits and offsets; that Petitioner is a citizen of the United States, being a body corporate as aforesaid, and has, at all times, borne true allegiance to the Government of the United States, and has not, in any way, aided, abetted, or given encouragement to rebellion against the Government of the United States, and that it believes the facts as stated in this Petition, to be true.

Wherefore, Petitioner prays judgment for such sum of money as may be justly due and owing to it, to-wit: \$17,000.37, and such further and other relief to which it may appear Petitioner is entitled.

LAMM LUMBER COMPANY,  
By RALPH H. CASE,  
Attorney-in-Fact.

RALPH H. CASE,  
900 National Press Building, Washington, D. C.,  
Attorney of Record.

15. [Duly sworn to by Ralph H. Case; jurat omitted in printing.]

16

Petitioner's Exhibit A

### TIMBER CONTRACT—KLAMATH INDIAN RESERVATION

This agreement made and entered into at the Klamath Indian School, State of Oregon, this 27th day of June 1917, under authority of the Act of Congress of June 25, 1910 (36 Stat. L. 855-857), and the Regulations and instructions for officers in charge of forests on Indian Reservations, approved June 29, 1911, as amended March

, 1917, between the Superintendent of the Klamath Indian School, and on behalf of the Klamath Indians, party of the first part, and The Lamm Lumber Company of Modoc Point, State of Oregon, party of the second part.

Witnesseth: That the party of the first part, agrees to sell to the said Lamm Lumber Company, party of the second part, upon the terms and conditions herein stated, all the merchantable dead timber, standing or fallen, and all the live timber marked, or otherwise designated for cutting by the proper officer of the Indian Service, estimated to be approximately one hundred sixty million feet, board measure, log scale, of pine timber (approximately ninety-five per cent yellow pine and five per cent sugar pine) and about ten million feet of white fir, located upon the designated area of approximately 500 acres, as hereinafter described.

For and in consideration of the foregoing, Lamm Lumber Co., party of the second part, agrees to pay to the Superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians, the full value of the said timber, shall be determined by the actual scale of the timber as it shall be cut, at fixed rates per thousand feet board measure Schibner Decimal C. scale, which rates for the specified periods of the contract shall be as follows:

For the period ending March 31st, 1920, Three dollars and twenty cents per thousand feet board measure for yellow pine (including so called bull pine), and sugar pine, and fifty cents per thousand feet board measure for white fir.

For the three year periods of the contract term beginning April 1920, April 1, 1923, April 1, 1926, and April 1, 1929, such prices per thousand feet board measure for each species as shall be fixed by the Commissioner of Indian Affairs in the manner hereinafter described.

It is agreed between the parties to this contract that the rates to be designated by the Commissioner of Indian Affairs for each of the said three year periods after April 1, 1920, shall be determined after a careful consideration of the cost of logging operations and lumber manufacture in comparison with the prevailing market prices for timber products in the Southern Oregon and Northern California region during the three years preceding January 1 of each year in which each new schedule of prices is fixed. Although the determination of the new rates shall lie wholly within the discretion of the Commissioner of Indian Affairs, a hearing will be afforded the purchaser upon request presented at least thirty days before the date on which the new stumpage rates are to become effective for any period. The new schedule shall be determined and notice thereof given the purchaser on or before February 1, 1920, February 1, 1923, February 1, 1926, February 1, 1929.

It is agreed further that the advance in stumpage rates as determined at the close of each specified period shall not exceed fifty

per cent of the increase in the average mill run wholesale net value of lumber at mills in Southern Oregon and Northern California during the three years preceding January 1, of the year in which the new prices are fixed.

18 As a basis for comparison in a readjustment of prices as above specified, it is stipulated by the parties hereto that the average mill run wholesale net values per thousand feet f. o. b. at mills in Southern Oregon and Northern California at the beginning of the three year period which is to end on January 1, 1920, are Fifteen Dollars and Seventy-five cents (\$15.75) for yellow pine (including bull pine) and sugar pine, and thirteen dollars and fifty cents (\$13.50) for white fir.

It is agreed by the party of the first part that the cutting of White Fir shall be optional with the purchaser, except that trees of these species, containing fifty per cent merchantable timber which are seriously injured in the logging operations shall be taken or paid for.

And The Lamm Lumber Company, party of the second part further agrees to cut and remove the said timber in strict accordance with the following conditions and all Regulations governing timber sales prescribed by the Secretary of the Interior.

1. The Term "Officer in Charge" whenever used in these Regulations, signifies the Officer designated by the Commissioner of Indian Affairs to supervise timber operations on the Klamath Indian Reservation.

2. The sale includes an area of approximately 11,500 acres to be designated on the ground before cutting begins. The boundaries of the unit are definitely shown on the attached map, which is made a part of this contract, and are further described as follows:

Beginning at the  $\frac{1}{4}$  corner of Sec. 35, Township 32 S., and Sec. 2, Township 33 S., Range 7 E., thence east to Williamson River; thence south along Williamson River until it enters a canyon; thence in a southerly and south-westerly direction along the top of the rim rock

to the south  $\frac{1}{4}$  corner of Sec. 22, Township 33 S., Range 7 E., 19 thence west on township line to line between Ranges 7 and

$7\frac{1}{2}$  E; thence north on range line to north line of Reservation; thence along north and west boundary of Reservation to East and West  $\frac{1}{4}$  line of Sec. 18, Township 33 S., R. 7 E., thence east approximately  $1\frac{3}{4}$  miles; thence north one mile, thence east  $\frac{1}{2}$  mile, thence north  $\frac{1}{2}$  mile, thence east 1 mile; thence north  $\frac{1}{2}$  mile; thence east 1 mile; thence north  $\frac{1}{2}$  mile to place of beginning.

The sale area includes 23 allotments comprising approximately 3,600 acres as to which the purchaser agrees to enter into separate contracts with the Indians who desire to sell and to pay to such Indians ten per cent of the estimated value of the timber on each allotment within thirty days from the approval of the contracts, it being understood and agreed that this contract merely authorizes the purchaser to enter into contracts with the individual Indians for the timber on allotments within the sale area, at the prices fixed for unallotted lands.

3. This contract will extend for a period of fifteen years from April 1, 1917, or until April 1, 1932. The actual cutting of timber other than for construction purposes will begin on or before July 1, 1918. Not less than twelve million feet will be paid for, cut, and removed prior to April 1, 1919, and not less than twelve million feet will be paid for, cut, and removed during each twelve months succeeding April 1, 1919, unless the Commissioner of Indian Affairs shall relieve the purchaser from cutting this minimum amount during any specified period because of unusual conditions involving serious hardship in a compliance with such requirement. All timber covered by this contract will be paid for, cut, and removed prior to April 1, 1932.

4. The timber will be paid for in advance payments of not less than \$10,000.00 each when called for by the officer in charge, except that the last payment in any logging season may be in a sum not less than \$2,500. The amount deposited with the accepted bid will be credited against the first payment. Payments for the timber shall be made to the Superintendent of the Klamath Indian School.

5. The timber upon valid land claims is exempted from sale and all timber to which there exists valid claims under contract with an officer of the Interior Department, or an Indian allottee, is exempted from this sale.

6. No timber will be cut until it has been paid for and no timber will be removed from the sale area until it has been scaled and stamped by the officer in charge.

7. No timber will be cut except from the area specified by the Officer in charge. No live timber will be cut except that marked or otherwise designated by the officer in charge. All dead timber standing or fallen, which is sound enough for lumber of any merchantable grade, and all green trees marked or otherwise designated for cutting by the officer in charge will be cut.

8. All merchantable timber used in buildings, skidways, bridges, construction of roads, or other improvements will be paid for at the contract price.

9. No unnecessary damage will be done to young growth or to trees left standing. Unmarked trees that are badly damaged during the process of logging will be cut if required by the officer in charge, and when such damage is due to carelessness, will be paid for at twice the price fixed by the contract. Unmarked living trees that are cut without the special direction of the officer in charge will also be scaled and paid for at twice the contract price.

10. Stumps will be cut so as to cause the least possible waste, and will not be cut higher than 18 inches on the side adjacent to the highest ground, lower when possible, except in unusual cases when, in the direction of the officer in charge, this height is considered impracticable.

11. All trees will be utilized to as low a diameter in the tops as possible so as to cause the least waste, and to a minimum diameter of 8 inches when the tops are straight and

sound; the log lengths will be so varied as to make this possible. All merchantable logs twelve feet or over in length will be taken, and shorter logs which are taken will be paid for.

12. Tops will be lopped and all brush piled compactly at a safe distance from living trees, or otherwise disposed of, as directed by the officer in charge. When required by officer in charge the brush and slash shall be burned by the purchaser at such times and under such precautions as the officer in charge may prescribe.

13. The timber will be scaled by competent scalers selected by the Commissioner of Indian Affairs. Timber will be scaled by the Decimal C. Scribner Rule and if required by the officer in charge will be skidded for scaling as he may direct. The maximum scaling length of all logs will be 16 feet; greater lengths will be scaled as two or more logs; on all logs four inches additional length will be allowed for trimming; logs overrunning this limit will be scaled as two feet longer. Logs containing not less than  $33\frac{1}{3}$  per cent of merchantable timber will be considered merchantable. Hewn railroad ties whose widest diameter inside the bark at the small end exceeds 12 inches will be scaled; smaller hewn ties will be counted and 50 ties considered equivalent to 1,000 feet B. M. diameters will be measured inside the bark at the tops of the logs and recorded at the nearest inch above or below the actual average diameter.

14. All cutting shall be done with a saw when possible. Marked trees or merchantable dead trees left uncut, timber wasted in tops, stumps and partially sound logs, trees left lodged in the process of falling, and any timber merchantable according to the terms of the contract which is cut and not removed from the sale area before logging on that portion of the area is completed, or is left within

any part of the sale area after the expiration of the contract  
22 shall be scaled and paid for. Both dead and marked green trees and snags considered a fire menace by the officer in charge will be felled but only such portions of them as are merchantable under the terms of the contract need be logged and paid for. Double scale will be charged for such trees if left uncut.

15. During the contract the purchaser and all of his employees, subcontractors, and employees of subcontractors shall do all in their power both independently and upon the request of forest officers to prevent and suppress forest fires. Unless prevented by circumstances beyond his control the purchaser, together with his employees, subcontractors, and employees of subcontractors, will be placed at the disposal of any authorized officer of the Indian Service for the purpose of fighting fires, provided that if the fire does not threaten the property of the purchaser or the area embraced in the contract, he will be reimbursed for services so rendered, unless the purchaser is directly or indirectly responsible for the origin of the fire.

16. So far as is reasonable, all branches of the logging shall keep pace with one another, and in no instances shall the brush disposal be allowed to fall behind the cutting except when the depth of snow or other adequate reason makes proper disposal impossible, when the disposal of the brush may with the written consent of the officer

in charge be postponed until conditions are more favorable. Operations shall be continued on each unit of the sale area as determined by the officer in charge until the logging of each unit is completed to his satisfaction.

17. Necessary skid roads, log chutes, camps, buildings, or other structures will be located as agreed upon with the officer in charge. Logging railroads within the reservation may be constructed under free permits to be issued by the Commissioner of Indian Affairs.

The way for such railroad shall be cut free from combustible

29 materials for a distance of fifty feet on each side of the tract where such clearing is considered necessary by the officer in charge as a precaution against forest fires. Sawmills constructed in connection with timber operations upon the reservation shall be constructed under permits issued by the Commissioner of Indian Affairs. Bonds in addition to that submitted in support of the contract, shall not be required, provided that the timber sale bond shall also cover the terms of such permits. Commissaries, construction camps and all other buildings and improvements constructed upon the sale area or other Indian lands in connection with logging or railroad operation will be constructed under permits issued by the Superintendent of the Klamath Indian School. Such permits will require that the ground in the vicinity of all structures shall be kept in a sanitary condition; that all rubbish shall be removed and burned or buried or otherwise disposed of as directed by the officer in charge; that when camps or other buildings are abandoned or removed, all debris shall be burned or otherwise disposed of as directed by the officer in charge; and that all buildings or other structures shall be removed from the sale area within six months from the date of the termination of the contract or become the property of the United States in trust for the Klamath Indians. Telephone lines shall be constructed under permits issued by the Superintendent of the Klamath Indian School. Such permits will provide that free use of such lines shall be allowed to Indian Service officers for official business and that no stumpage charge will be made for poles used in construction of these lines, if in the judgment of the officer in charge, they are of sufficient value to the Indian Service to make this concession equitable. All other telephone lines, trails, and traveled roads traversing the cutting area, which are now constructed

or shall hereafter be constructed by other parties than the  
24 purchaser, shall be kept open and free at all times from ob-  
struction by logs, brush and debris caused by logging opera-  
tions, and all telephone lines, trails, and roads damaged or destroyed  
by logging operations shall be repaired or rebuilt as required by the  
officer in charge.

18. Donkey engines or steam skidders will be used in logging only with the written approval of the Superintendent of the Klamath Indian School, and only on areas in which the damage to remaining timber and reproduction will be negligible.

19. Oil shall be used for fuel in locomotives and traction engines unless the written consent of the officer in charge is first obtained for

the use of other fuel. All locomotives, donkey engines, or other steam power engines when not burning oil, shall each be equipped with an efficient spark arrester, which is satisfactory to the officer in charge. Donkey engines shall be equipped with a steam pump with no less than a 1-inch discharge, 150 feet of fire hose, 6 buckets and a constant supply of the equivalent of 6 barrels of water, and at least 5 shovels, this equipment to be suitable for fire fighting purposes and to be so used when necessary.

20. At each setting of each Doukey engine or other steam logging contrivance in which oil is not used as fuel, the ground shall be cleared of all inflammable material for a distance of 50 feet in all directions. During the period from June 1 to October 1 of each year no donkey engine or other steam logging contrivance in actual use for which oil is not used for fuel shall be left during the noon hour without a watchman and during the same period the purchaser may be required to employ a night watchman to guard against the escape of fire from logging engines.

21. No rigging shall be slung upon trees left for seed unless absolutely necessary. Where it is necessary to fasten chockers or straps around trees which are to be left for seed they shall be protected from girdling by first encircling the trees with suitable poles or blocks of wood.

22. The approximate minimum diameter limited at a point four and one-half feet from the ground to which living trees are to be cut is 18 inches. Trees above these diameters may be reserved for seed or protection and merchantable trees below these diameters may be marked at the discretion of the officer in charge.

23. The purchaser will pay for damage to property of the Indians growing out of his operations under the sale. The purchaser shall comply with all Regulations relative to the maintenance of order on Indian reservations. Indian labor shall be employed in the cutting and removal of the timber and in the disposal of the brush whenever the use of such labor is practicable.

24. The title of the timber covered by the contract shall not pass to the purchaser until it has been paid for and sealed, measured, or counted.

25. All questions relative to the location of railroad spurs, the exact areas to be logged, the location of all structures and the requirements to be observed in their construction and other matters concerned, with the operations of the purchaser upon the sale area shall be settled by the officer in charge. Final decisions as to points involved in the interpretation of the Regulations and provisions of the contract governing the sale, cutting and removal of the timber shall be rendered by the Secretary of the Interior. Work may be suspended by the officer in charge if the terms of the contract are disregarded, and the violation of any one of such terms, if persisted in, shall be sufficient cause for the revocation of the contract and the cancellation of other permits and privileges.

26. Refunds of deposits under the contract shall be made only at the discretion of the Commissioner of Indian Affairs.

26. 27. This contract shall be void and of no effect until approved by the Secretary of the Interior, and no assignment of the same in whole or in part shall be valid without the written consent of the Secretary of the Interior.

28. All books pertaining to the logging operations and the milling business of the purchaser, will be open to inspection at any time by an officer authorized by the Commissioner of Indian Affairs and to make such inspection with the understanding and agreement that any information obtained through such inspection shall be considered confidential and without the consent of the purchaser, shall not be disclosed to anyone except those connected with the government service.

29. No member of, or Delegate to Congress shall be admitted to any share, part, or interest in any contract, or to any benefit derived therefrom (see sections 114 and 116, act of March 4, 1909, entitled "An act to Codify, Revise, and Amend the Penal Laws of the United States," 33 Stat. 1088, 1109) and no person undergoing a sentence of imprisonment at hard labor shall be employed in carrying out any contract. (See Executive Order of May 18, 1905.) The cutting or removal of timber from Indian lands in breach of the terms of any contract, and without lawful authority, or the leaving of fires unextinguished, will render the contractor liable to the penalties prescribed by Section 6 of the Act of June 25, 1910 (36 Stat. L., 855, 857).

30. As a further guarantee of a faithful performance of this contract the said party of the second part agrees to furnish within 30 days from the execution of this contract a bond in the penal sum of Thirty Thousand Dollars (\$30,000) and further agrees that upon the failure of his part to fulfill any and all of the conditions and requirements hereinbefore set forth all moneys paid under this agreement shall be retained by the United States to be applied as far as may be to the satisfaction of their obligations assumed hereunder.

LAMM LUMBER COMPANY.

(Signature of Purchaser.)

(Signature of Purchaser.)

C. H. ASBURY,

(Superintendent Klamath Indian School.)

Witness:

Approved Aug. 27, 1917,

By: S. G. HOPKINS,  
1st Asst. Secy.

## "INDIAN SERVICE—BOND

"Know all men by these presents, that the Lamm Lumber Company of Modoc Point, State of Oregon, a corporation organized and existing under the laws of the State of Oregon, having an office and principal place of business at Modoc Point in the State of Oregon, as principal, and Stampe Q. Lamm of Danville, State of Illinois, and Edward S. Moore, of Danville, State of Illinois, as sureties are held and firmly bound unto the United States of America in the penal sum of Thirty Thousand and No/100 dollars (\$30,000.00) lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, each of us, our heirs, executors, administrators, successors, and assigns jointly and severally, firmly by these presents.

28 "Sealed with our seals and dated this the 24th day of November, 1927. The conditions of this obligation is such that"

Whereas the Lamm Lumber Company principal, herein, did on the 31st day of May 1917 propose to purchase at the rate of Three dollars and twenty-five cents for Yellow Pine and Sugar Pine, and fifty cents for White Fir per M Feet B. M. Log Scale for the period ending March one, 1920, and such prices for each species as shall be fixed by the commissioner of Indian Affairs, during the remaining years of the contract period ending April one, 1932. The dates for readjusting the prices to be April one, 1920, April one, 1923, April one, 1926, and April one, 1929, on certain lands within the Klamath Indian Reservation in Oregon described as follows, to-wit:

Beginning at the  $\frac{1}{4}$  corner of Sec. 35, Twn. 32 S and Sec. 2 Twn. 33 S Range 7 Eth east to Williamson River; Th south along Williamson River until it enters a Canyon; Th. in a southerly and southwesterly direction along the top of the rim rock to the south  $\frac{1}{4}$  corner of Sec. 32, Twn. 33 S Range 7 E Th. west on township line to line between Ranges 7 and  $7\frac{1}{2}$  E. Th north on range line to north line of Reservation Th. along north and west boundary to east and west  $\frac{1}{4}$  line of sec. 18 T. 33 S R 7 E, Th. east  $1\frac{3}{4}$  miles Th. north one mile Th. East  $\frac{1}{2}$  miles Th. north  $\frac{1}{2}$  mile. Th. E 1 mile, th. N.  $\frac{1}{2}$  mile Th. E. 1 mile, Th. n.  $\frac{1}{2}$  mile, and did stipulate and agree that if the said proposal was accepted by the Secretary of the Interior the proposal and its acceptance should constitute a binding contract for the sale of said timber, and that said principal would cut, fell, remove, and pay for said timber in accordance with the regulations accompanying the proposal, and

Whereas, said Secretary of the Interior did on the 22nd day of June, 1917, duly accept said proposal and the proposal thereupon became a binding contract, as evidenced by a formal agreement executed on June 27th, 1917.

29 Now, Therefore, if the above bounden Lamm Lumber Company, its heirs, executors, administrators, successors, and assigns, shall faithfully conform to and observe all the laws and regula-

tions made and which shall be hereafter made for the governing of trade and intercourse with the Indians, and in no respect violate the same and conduce all timber operations in accordance with said regulations and all provisions of the contract entered into with the said Secretary of the Interior and C. H. Ashbury and in no respect violate said regulations or contract, or either of them, then and in that event, this obligation shall be null and void; otherwise it shall remain in full force and effect.

In witness whereof, we hereunto set our hands and seals this the twenty-fourth day of November, 1917.

[LAMM LBR. CO. SEAL]

EDWARD C. LAMM,  
President.

ETHEL LAMM, *Sect'y.*

Two witnesses required to signature of each principal and surety. Principals and sureties sign and affix seals.

[SEAL]

LAMM LBR. COMPANY,  
By W. E. LAMM,

*Vice President,  
Modoc Point, Ore.*

Witnesses:

JESSIE FRANCE, *Danville, Ill.*  
J. L. E. FLEMING, *Danville, Ill.*

[SEAL]

STAMPER Q. LAMM,  
*Danville, Ill.*

JESSIE FRANCE, *Danville, Ill.*  
J. E. FLEMING, *Danville, Ill.*

EDWARD S. MOORE,  
*Danville, Ill.*

JESSIE FRANCE, *Danville, Ill.*  
J. E. FLEMING, *Danville, Ill.*

30 STATE OF ILLINOIS,

*County of Vermilion, SS:*

On this the 17th day of December, 1917, before me, Fred L. Draper, A United States Commissioner in and for the said county, personally came Stamper Q. Lamm and Edward S. Moore, who signed the foregoing obligation each to me known, who being by me duly sworn, did each for himself, depose and say that he was more than twenty one years of age and in all respects fully competent to make and enter into contract, and that they owned and possessed property not exempt by law from execution and above their debts and liabilities and free from incumbrances.

Stamper Q. Lamm to the amount of Thirty Thousand dollars (\$30,000.00) and Edward S. Moore, to the amount of Thirty Thousand dollars (\$30,000.00).

STAMPER Q. LAMM,  
EDWARD S. MOORE.

Signature of Notary Fred L. Draper, United States Commissioner  
Eastern District Illinois. My commission expires May 1, 1921.

If the bond is executed in the District of Columbia the following certificate must be signed by a United States Officer other than a Notary Public. If executed elsewhere by a Judge of the United States Court, an United States District Attorney, a United States postmaster (or such other office of the United States as may be acceptable to the Secretary of the Interior) residing in the district where the bond is executed.

Eastern District Illinois, December 17, 1921.

31 Stamper Q. Lamm and Edward S. Moore, the sureties who have signed the foregoing bond are known to me as residents of Danville, Illinois, and citizens of the United States, and that I believe them to be amply sufficient security for the amount thereof and that the bond is good.

FRED L. DRAPER,  
U. S. Commissioner,  
Eastern District Illinois.

Department of the Interior, January 24, 1918.

Approved:

S. G. HOPKINS, Assistant Secretary.

5-489. Duplicate. Allotment No. 1011.

DEPARTMENT OF THE INTERIOR, INDIAN SERVICE

TIMBER CONTRACT

This agreement, made and entered into at the Klamath Indian School, Klamath Agency, State of Oregon, this 24th day of June, 1918, under authority of the Act of Congress of June 25, 1910 (36 Stat. L., 855, 857), between John Cole, father and natural guardian of John W. Cole, minor, an Indian under the jurisdiction of the Superintendent of the Klamath Indian School, party of the first part, and Lamm Lumber Co., party of the second part.

Witnesseth, That the party of the first part agrees to sell to party of the second part, upon the terms and conditions hereinafter stated, all the merchantable timber marked for cutting by the proper officer, estimated to be 2,000,000 feet of pine and a small amount of white fir, more or less, on the following described lands, to wit: NE/4 Sec. 30, T 33 S, R. 7 East, within the limits of the Klamath Indian Reservation, situated in the County of Klamath, State of Oregon, the same being lands which have been allotted to John W.

Cole, under the provisions of the Act of Feb. 8, 1887.

33 For and in consideration of the foregoing the party of the second part agrees to pay to the Superintendent of the Kla-

math Indian School, Klamath Agency, State of Oregon, the sum of sixty-five hundred and no/100 dollars (\$6500.00) more or less, as shall be determined by the actual scale, measurement, or count, for the said timber at the rate of \$3.25 per M. for Pine and 50c per M. for white fir for the period ending Mar. 31, 1920. For the 3 year periods of the contract term beginning April 1, 1920, April 1, 1925, April 1, 1926, and April 1, 1929, such prices per M. for each Species as shall be fixed by the Commissioner of Indian Affairs in the manner prescribed in the tribal timber contract dated June 27, 1917.

The party of the second part further undertakes and agrees to pay ten per cent (10%) of the estimated value of the timber sold within thirty days from the date of the approval of this contract by the Commissioner of Indian Affairs, to pay thirty per cent of the said sum before any cutting of timber upon said land, and to pay the total purchase price before any timber is removed from the said land, unless special authority for a different manner of payment is granted by the Commissioner of Indian Affairs.

The party of the second part further undertakes and agrees that they will cut and remove the said timber in strict accordance with the following and all other general regulations which are prescribed by the Department of the Interior as to the sale of timber from Indian lands:

1. The term "Officer in charge" whenever used in these regulations signifies the Superintendent of the Klamath Indian School, or any other officer specially designated by the Commissioner of Indian Affairs to supervise timber operations on the Klamath Indian Reservation.

2. No timber shall be cut from any areas except those designated by the officer in charge. Unless expressly stipulated to the contrary in the contract, each sale shall include all dead timber, standing or fallen, which is sound enough for lumber of any merchantable grade or for timbers, and all green timber marked or otherwise designated for cutting upon the specified sale area. No living trees except those which are designated for cutting by the officer in charge shall be cut. The title to timber shall not pass to the purchaser until it has been scaled, measured, or counted, stamped by the officer in charge, and paid for. Unless special authority has been granted by the Commissioner of Indian Affairs, no timber shall be removed from the sale area until full payment therefor has been made.

3. Sawmills, camps, chutes, logging railways, and such other improvements as are necessary for conducting lumber operations may be constructed under the supervision of the officer in charge, subject to such conditions as he may prescribe for the protection and improvement of the surrounding forest and for the best interests of the Indians. All merchantable timber used in their construction, and in skidways, bridges, roads, or other improvements, shall be paid for at the contract price. The officer in charge shall reasonable restrict the use of young growth for such purposes.

4. All cutting shall be done with a saw when possible and no unnecessary damage shall be done to young growth and trees left standing. Designated living trees or merchantable dead timber left uncut, timber wasted in tops, stumps, and partially sound logs, trees left lodged in process of felling, standing trees badly injured during the lumbering operations, and any merchantable timber covered by the terms of these regulations and the contract, which is not removed from any part of the cutting area, when logging on that part is completed, or is left on the sale area after the expiration of the contract,

35 shall be scaled and paid for at the contract rate. The officer in charge may require the cutting of living or dead trees or snags, which in his opinion constitute a fire menace. Double scale may be charged for such trees left uncut or for undesignated living trees willfully or negligently cut.

5. Stumps shall not be cut higher than 18 inches, lower when possible, so as to cause the least waste, and all trees shall be utilized to a diameter of 8 inches in the tops when merchantable to that diameter. The log lengths shall be so varied as to make such utilization possible.

6. The approximate minimum diameter limit at a point  $4\frac{1}{2}$  feet from the ground to which living trees are to be cut is 18" but trees above these diameters may be reserved for seed or protection, and merchantable trees below these diameters may be marked in the discretion of the officer in charge.

7. Logging operations shall be concentrated as far as possible, and so conducted as to completely log and clean up designated units of the sale area successively as agreed with the officer in charge. Tops shall be lopped and all brush and tops piled compactly at a safe distance from young growth and standing trees at the time of felling, or otherwise disposed of as required by the officer in charge. In the discretion of the officer in charge brush shall be burned by the purchaser under such precautions as to prevent the spread of fire.

8. During the time that any contract remains in force the contractor shall, without charge or expense to the United States or the Indians, do all in his power to prevent and suppress forest fires upon the area covered by the contract or adjacent areas, shall comply with all regulations relative to the maintenance of order on Indian reservations, and shall employ Indian labor in the cutting and removal of the timber and in the disposal of the brush whenever the use of such labor is practicable.

36. 9. Timber will be scaled, measured, or counted by officers selected by the Commissioner of Indian Affairs. The cost of the examination, advertisement, marking and scaling of the timber, and the expense of general supervision and protection of the sale area and the adjacent areas from fire by the United States officers shall be paid from the proceeds of the sale of the timber. Timber will be scaled by the Scribner Rule Decimal C, and if required by the officer in charge shall be piled and skidded for convenient scaling. The maximum scaling length of all logs will be 16 feet. Logs over 16 feet in

length will be scaled as two or more logs, in lengths not less than 8 feet when practicable, and with the proper allowance for the increase in diameter at the points of division. Upon all logs three inches additional will be allowed for trimming. Logs overrunning this allowance will be scaled as though two feet longer. Diameters will be measured inside the bark at the small end of the log and recorded at the nearest inch above or below the actual diameter. Proper deductions will be made for defects in logs.

10. Unless extension of time is granted, all timber will be cut and removed on or before and none later than April 1, 1932, and at least will be paid for, cut, and removed on or before. The purchaser will be required to cut and remove the timber at such time, in such places, and in such quantities as to prevent, so far as possible, deterioration as a result of fire or windstorm, and will be required to pay the contract rates for any timber which may deteriorate in value through failures to care for the same after a fire or windstorm.

11. No Member of or Delegate to Congress shall be admitted to any share, part, or interest in any contract, or to any benefit derived therefrom (see sections 114 and 116, act of March 4, 1909, entitled "An act to codify, revise, and amend the penal laws of the United States,"

35 Stat. 1088, 1109), and no person undergoing a sentence of imprisonment at hard labor shall be employed in carrying out any contract (see Executive Order of May 18, 1906). The cutting or removal of timber from Indian lands in breach of the terms of any contract, and without other lawful authority, or the leaving of fires unextinguished, will render the contractor liable to the penalties prescribed by section 6 of the act of June 25, 1910 (36 Stat. L. 855, 857).

12. Work may be suspended by the officer in charge if the regulations are disregarded, and the violation of any one of the regulations, if persisted in, shall be sufficient cause for the Commissioner of Indian Affairs to revoke a contract and to cancel all permits for other privileges. The decision of the Commissioner shall be final as to the interpretation of any of the foregoing regulations or as to the faithful execution of the terms of any contract.

It is further understood and agreed that this contract shall be void and of no effect until approved by the Commissioner of Indian Affairs.

Signed and sealed in quadruplicate this 24th day of June, 1918.

[CORPORATE SEAL, IF CORPORATION]

W. E. LAMM,  
Vice-President.

Attest:

ETHEL LAMM, Secretary.

Duplicate.

[SEAL]

[SEAL]

LAMM LUMBER COMPANY,

By: W. E. LAMM, Vice-Pres.

JOHN COLE,

Klamath Agency, Oregon.

## Witnesses:

A. E. JOHNSON, *Modoc Point, Oregon.*

JOHN HAMILTON, *Klamath Falls, Oregon.*

J. W. BUFORD, *Klamath Agency, Oregon.*

GOMER JONES, *Klamath Agency, Oregon.*

38 The above contract is approved this the 18th day of July, 1919, under the conditions stated therein.

E. B. MERRITT,

*Acting Commissioner of Indian Affairs.*

STATE OF OREGON,

*Klamath County:*

This Instrument was rec'd for record on the 17th day of January, A. D. 1921, at 2:30 P. M., and duly recorded in Volume 4, of Miscel. Page 67.

C. R. DE LAP,

*County Clerk,*

By: GARRETT KLANRIPER,

*Deputy.*

39

*II. History of proceedings.*

On January 20, 1930, the defendant filed a general traverse to plaintiff's petition.

On April 25, 1934, the defendant filed a motion for leave to withdraw the general traverse and file a plea to the jurisdiction in lieu thereof.

Said motion was allowed by the court on June 12, 1934, and, on the same day, the defendant filed a plea to the jurisdiction.

On November 5, 1934, the plea to the jurisdiction was argued and submitted.

On December 3, 1934, the court entered the following on said plea:

**ORDER**

This case comes before the court on the defendant's plea to the jurisdiction of the court. Upon consideration thereof it is ordered this 3d day of December, 1934, that said plea be and the same is overruled without prejudice.

After the overruling of the defendant's plea to the jurisdiction no other answer by the defendant was filed.

*III. Submission of case.*

On June 1, 1937, this case submitted on merits, without argument, by Mr. Ralph H. Case, for plaintiff, and by Mr. James J. Sweeney, for defendant.

40 IV. *Special findings of fact, conclusion of law and opinion of the court by Green, J.*

Filed January 12, 1938

Mr. Ralph H. Case for plaintiff.

Mr. James J. Sweeney, with whom was Mr. Assistant Attorney General Sam E. Whitaker, for defendant.

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

*Special findings of fact*

1. Lamm Lumber Company, plaintiff, is a corporation organized under the laws of the State of Oregon, with its principal office and place of business at Modoc Point, Oregon.

2. In March 1917, the Assistant Secretary of the Interior advertised for sale about 160,000,000 feet of timber (about 90% yellow pine and 10% sugar pine) and 10,000,000 feet of white fir upon about 11,500 acres within township 33 south, range 7 east, on what is designated as Southern Mount Scott Unit, within the Klamath Indian Reservation, Klamath, Oregon.

3. Plaintiff in response to this advertisement bid on the property offered for sale and its bid was accepted. On June 27, 1917, a contract was signed by plaintiff and later approved by the Assistant Secretary of the Interior. The contract stated that it was made by

41 the Superintendent of the Klamath Indian School "for and on behalf of the Klamath Indians, party of the first part," by

the terms of which the purchaser agreed to pay the value of the timber to "the Superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians." This contract is attached to the petition as Exhibit A and made a part hereof by reference.

Under the contract, the party of the first part agreed to sell to the party of the second part all merchantable dead timber standing or fallen, and all live timber marked or designated for cutting by officers of the Indian Service, estimated to be about 160,000,000 feet board measure, log scale of pine timber (about 95% yellow pine and 5% sugar pine), and about 10,000,000 feet of white fir, located upon an area of about 11,500 acres of land, designated as the Southern Mount Scott Unit within the Klamath Indian Reservation.

Under the contract the party of the second part agreed to pay to the superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians, the full value of the timber to be cut at fixed rates per M feet board measure, Scribner Decimal C scale. The contract prescribed the rates

for specified periods of the contract and with reference to changes in the rates provided:

"It is agreed further that the advance in stumpage rates as determined at the close of each specified period shall not exceed fifty per cent of the increase in the average mill run wholesale net value of lumber at mills in Southern Oregon and Northern California during the three years preceding January 1, of the year in which the new prices are fixed."

Among other things, the contract also provided:

"2. The sale includes an area of approximately 11,500 acres to be designated on the ground before cutting begins. The boundaries of the unit are definitely shown on the attached map, which is made a part of this contract, and are further described as follows: [Here followed a description of the boundaries as to which there is no dispute in the case.]

"The sale area includes 23 allotments comprising approximately 3,600 acres as to which the purchaser agrees to enter into separate contracts with the Indians who desire to sell and to pay to such Indians 10 per cent of the estimated value of the timber on each allotment within thirty days from the approval of the contracts, it being understood and agreed that this contract merely authorizes the purchaser to enter into contracts with the individual Indians for the timber on allotments within the sale area, at the prices fixed for unallotted land.

"3. This contract will extend for a period of fifteen years from April 1, 1917, or until April 1, 1932. The actual cutting of timber, other than for construction purposes, will begin on or before July 1, 1918. Not less than twelve million feet will be paid for, cut, and removed prior to April 1, 1919, and not less than twelve million feet will be paid for, cut, and removed during each twelve months succeeding April 1, 1919, unless the Commissioner of Indian Affairs shall relieve the purchaser from cutting this minimum amount during any specified period because of unusual conditions involving serious hardship in a compliance with such requirement. All timber covered by this contract will be paid for, cut, and removed prior to April 1, 1932.

"4. The timber will be paid for in advance payments of not less than \$10,000 each when called for by the officer in charge, except that the last payment in any logging season may be in a sum not less than \$2,500. The amount deposited with the accepted bid will be credited against the first payment. Payments for the timber shall be made to the Superintendent of the Klamath Indian School.

"27. This contract shall be void and of no effect until approved by the Secretary of the Interior, and no assignment of the same in whole or in part shall be valid without the written consent of the Secretary of the Interior.

"30. As a further guarantee of a faithful performance of this contract the said party of the second part agrees to furnish within 30 days from the execution of this contract a bond in the penal sum of thirty thousand dollars (\$30,000), and further agrees that upon the failure on his part to fulfill any and all of the conditions and requirements hereinbefore set forth all moneys paid under this agreement shall be retained by the United States to be applied as far as may be to the satisfaction of their obligations assumed hereunder."

43. This bond was furnished and made to the United States in accordance with the above agreement.

4. Pursuant to the provisions of article 2 of the contract of June 27, 1917 (finding 3), plaintiff, on June 24, 1918, entered into a contract with John Cole, father and natural guardian of John W. Cole, minor, an Indian under the jurisdiction of the superintendent of the Klamath Indian School. Under the contract, John Cole agreed to sell to plaintiff all merchantable timber properly marked for cutting, which was estimated to be about 2,000,000 feet of pine, and a small amount of white fir, then situate on the NE $\frac{1}{4}$ , Sec. 30, Twp. 33 S., R. 7 E., and within the limits of the Klamath Indian Reservation. The contract further provided that plaintiff should pay to the superintendent of the Klamath Indian School an estimated sum of \$6,500 for the period ending March 31, 1920. It also provided that for the three-year periods beginning April 1, 1920, April 1, 1923, April 1, 1926, and April 1, 1929, plaintiff should pay such prices as should be fixed by the Commissioner of Indian Affairs, in the manner prescribed in the contract of June 27, 1917 (finding 3). On July 18, 1918, this contract was approved by the Acting Commissioner of Indian Affairs, and on August 31, 1918, \$650 was paid to the Superintendent of the Klamath Indian Agency as an advance payment thereunder. The contract was recorded in Klamath County, Oregon, on January 17, 1921.

5. On March 2, 1919, John W. Cole died. Conformably with the requirements of the Act of June 25, 1910 (36 Stat. 855), and the Regulations of the Department, the Assistant Secretary of the Interior, on August 18, 1920, determined that John Cole, father of the deceased Indian allottee, John W. Cole, was his sole heir. On November 19, 1920, the United States, through the General Land Office, issued to ~~John Cole~~ a fee simple patent covering the land theretofore patented to John W. Cole, deceased. On March 26, 1921, John Cole and his wife deeded the land theretofore patented to him to Luke E. Walker. This deed was recorded in Klamath County, State of Oregon, on March 26, 1921. No question arose between the plaintiff and Luke E. Walker respecting the cutting of timber under 44 the allotment contract of June 24, 1918, until some time in 1925, in which year Walker set up a claim of superior title and right to the timber thereon.

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6. In June 1926, Walker commenced suit against the plaintiff in the Circuit Court of Klamath County, Oregon. The petition was in two counts, the first count being based on an allegation that the plaintiff had unlawfully entered upon the NE $\frac{1}{4}$  of Sec. 29, Twp. 33, R. 7 E. W. M., and cut and carried away timber therefrom to the value of \$74.83, damaged the premises in the sum of \$500, and claimed treble damages by reason of such acts. The petition also set up a claim on account of trespass in establishing and using a logging road over the premises above described for which damages were asked in the sum of \$500 in one item and \$300 in another. Damages of \$500 were also asked because of the manner in which trees were cut upon adjoining premises, allowing tops and debris therefrom to be cast on this property.

In a second count the petition asked damages in the sum of \$418.84 for timber and ties cut and carried away from the NE $\frac{1}{4}$  of Sec. 30, Twp. 33 South, R. 7 E. W. M., and \$1,000 for the trespass in so doing and claimed treble damages. The second count also set up a claim for constructing a logging railroad over the premises and the trespass in using the same in the sum of \$500. The petition likewise contained a general plea for recovery of \$1,800 as costs and disbursements in the suit. The total amount of the items of both counts of the petition and the general allegation was \$5,588.67, the amount claimed on the second count being somewhat larger than stated in the first.

In its answer to the second count of Walker's suit the plaintiff set out the facts with reference to the contract which had been made with John Cole as hereinabove recited and alleged that a patent was erroneously issued by the defendant to John Cole, father of John W. Cole, and that John Cole gave a deed to Walker for the land described in the contract, to-wit, NE $\frac{1}{4}$  of Sec. 30, Twp. 33, R. 7. Plaintiff further alleged that any rights acquired by Walker were inferior to those which plaintiff had acquired through its contract with John Cole and that Walker had knowledge of plaintiff's rights before he received the deed from John Cole for the premises in controversy. The Superintendent of the Klamath Indian Reservation and the Commissioner of Indian Affairs were informed of the commencement of this suit and the progress of litigation therein, but the Government did not appear or take any part in the action.

7. On June 18, 1928, a consent judgment was entered in the Circuit Court of Klamath County, Oregon, against the plaintiff in the sum of \$15,000. The judgment recited that it was for the acts alleged and complained of in the complaint in the case and for the removal of timber by the defendant therein cut on the two tracts, namely, NE $\frac{1}{4}$  of Sec. 29, Twp. 33 S., R. 7 E. W. M., and NE $\frac{1}{4}$  of Sec. 30, Twp. 33 S., R. 7 E. W. M.

The judgment entered in the suit begun by Walker was subsequently paid by plaintiff and about the same time as a part of the settlement Walker deeded to plaintiff the realty which had been conveyed to him by John Cole and assigned to plaintiff all his interest and title in the proceeds of the timber upon the Cole allotment paid or to be paid by the plaintiff to the Superintendent of the Klamath Reservation. In the meantime, the Superintendent of the Klamath Reservation had been paid the sum of \$12,869.31 for timber cut by plaintiff on the John W. Cole allotment.

8. Shortly after the entry of judgment referred to in the preceding finding, the plaintiff petitioned the Commissioner of Indian Affairs to reimburse it for the damage and loss sustained by it on account of the act of the United States in issuing to John Cole a fee simple patent to the land covered by the timber contract executed between the plaintiff and John Cole on June 24, 1918, as hereinabove recited. This petition asserted in substance that after the issuance of the patent plaintiff had no alternative than to effect the best settlement possible with Luke E. Walker and it asked to be paid the difference between the sum of \$15,000 paid to Walker and whatever amount might be repaid to it by the Commissioner of Indian Affairs.

The Commissioner of Indian Affairs denied this request but advised the plaintiff that it was entitled to the proceeds from the 46 sale of the John Cole allotment timber in the hands of the Superintendent of the Klamath Agency less 8% to reimburse the United States for administrative costs.

On August 27, 1928, the Superintendent of the Klamath Indian Agency refunded to plaintiff \$11,189.77 out of the price of the timber cut on the John W. Cole allotment under contract with plaintiff. This did not include the sum of \$650 paid as an advance payment by the Lamm Lumber Company and deposited to the credit of the Indian minor, John W. Cole, deceased. The 8% deducted, amounting to \$1,029.54, was retained by the United States to reimburse it for the expenses incident to administering the contract between the plaintiff and John Cole.

The difference between the sum repaid by the Superintendent of the Klamath Agency to the Lamm Lumber Company, namely, \$11,189.77, and the sum of \$15,000 paid by the Lamm Lumber Company to Walker in settlement of the judgment was \$3,810.23. The plaintiff also incurred additional expenses in the way of an attorney's fee of \$1,000 and miscellaneous expense aggregating \$63.75 in effecting the compromise settlement of the suit filed against it by Walker. The difference between the sum repaid by the Superintendent to the Lamm Lumber Company and the total of plaintiff's expense as above recited was \$4,873.98.

9. The timber contract attached to the petition provided for a set price from its inception up to April 1, 1920, and that for the three-

year periods of the contract term beginning April 1, 1920, April 1, 1923, April 1, 1926, and April 1, 1929, the price should be such as should be fixed by the Commissioner of Indian Affairs in the manner specified by the contract. (See Finding 3.) Increases were made for the periods beginning April 1, 1920, and April 1, 1923.

On December 22, 1925, plaintiff was advised that its contract provided for readjustment of stumpage prices effective April 1, 1926, and was asked to consent that the date of such price readjustment notice be extended to February 28, 1926. On January 7, 1926, plaintiff replied that this would be satisfactory, but on February 26, 1926, the Commissioner of Indian Affairs directed that the plaintiff be advised that there would be no increase in stumpage prices on April 1, 1926; and on February 26, 1927, the Commissioner 47 notified the plaintiff by telegram that the price of stumpage would not be increased on April 1, 1927. The matter continued to be the subject of correspondence between the parties during 1926 and 1927.

On January 20, 1928, the Commissioner of Indian Affairs wrote a letter to plaintiff in which he reviewed the price increases made effective in 1920 and 1923 and the facts which prompted the Department not to impose a price increase effective April 1, 1926; or April 1, 1927, but stated that on April 1, 1928, price increases which were specified would become effective and plaintiff was asked whether it would voluntarily agree to an increase of 56 cents per M feet in the price of yellow pine from the Southern Mount Scott Unit during the year beginning April 1, 1928, this increase being mentioned as a compromise and less than would be justified by the market.

On January 30, 1928, the Commissioner of Indian Affairs sent the following telegram to plaintiff:

"Please wire today whether you accept suggested compromise of 56 cent increased price Klamath timber."

To this plaintiff replied:

"We will not contest proposed increase of price if established by Department. Stop. However, we had expected hearing and would like same delayed until after last year's figures in and after bids received on present advertised unit. Stop. We believe Department idea of values will change."

On January 31, 1928, the Commissioner of Indian Affairs sent another telegram to plaintiff as follows:

"Your telegram thirtieth construed as request for waiver final notice of increased price Southern Mount Scott Unit until April first in order that figures to be presented by you may be considered."

On February 1, 1928, plaintiff wrote the Commissioner of Indian Affairs a letter in which was said:

"In our wire of January 30th we advised that we would not contest an increase in stumpage price up to 56 cents which you suggested, if the Department saw fit to make such increase, but requested that your decision be deferred until after last year's figures and the bids on the newly advertised units were received."

48 It further stated that it understood from the telegram of January 31st that decision would be delayed until April 1st, and suggested that action be deferred until after April 10th, on which date bids would have been received on other units and the price change would then be made as of April 1st. To this letter the Commissioner of Indian Affairs replied on February 9, 1928, stating that it did not appear that bids to be received on other units of the Klamath Reservation should be considered in view of certain facts stated in the letter and that the office would advise plaintiff definitely prior to April 1, 1928, as to the increase to be made under plaintiff's contract.

On March 24, 1928, the Commissioner of Indian Affairs sent the following telegram to plaintiff:

"Decision reached increase price Southern Mount Scott Unit 40 cents effective April 1st. Can hear you as requested your attorney."

On April 1, 1928, plaintiff addressed telegrams to certain Senators in Washington, stating that the Commissioner of Indian Affairs had notified five Klamath operators that a stumpage price increase of 40 cents would be made effective April 1, 1928; that the market was in terrible shape and getting worse; that no rise on any unit was justified, because average for District last year did not show interest on investment; that the action was contrary to the terms of the contracts involved in its case and also in the case of the Algoma Lumber Company, and asked that the Senators intercede in behalf of all operators.

On April 2, 1928, a Senator forwarded to the Commissioner of Indian Affairs the telegram protesting the price increase made effective April 1, 1928, and after referring to a conversation with the Commissioner, expressed the hope that he would give careful attention to the matter with a view of preventing excessive stumpage prices.

In letters addressed to the Oregon Senators, on April 3, 1928, the Commissioner of Indian Affairs advised, in substance, that in view of the interest expressed he had again reviewed the matter and regretted to say that he was unable to reverse his conclusions but must adhere to the 40 cent increase.

49 On April 17, 1928, plaintiff sent a letter to the Commissioner of Indian Affairs stating at length the reasons why it considered the recent increase in the price of the timber unjustified and claiming that the Department had no right under the contract to increase the price until April 1, 1929, and should withdraw the in-

crease of 40 cents per M feet. To this letter the Chief of the Forestry Section of the Bureau of Indian Affairs replied in a so-called memorandum dated April 18, 1928, analyzing the facts and statements set forth in plaintiff's letter of April 17, 1928, also stating facts in reply thereto, and asserting that telegrams and letters received from the plaintiff had definitely accepted the Department's suggested compromise of 56 cents [one-half of \$1.12 which the Department had declared would not be unreasonable], that later the Department decided to increase the price only 40 cents, and that Mr. Lamm could not now insist on strictly following the wording of the contract.

From April 1, 1928, the date on which the challenged price increase was made effective, to April 30, 1929, the company scaled a total of 30,315,980 feet of pine timber. That quantity of timber at 40 cents a thousand feet board measure totals \$12,126.39, which was paid by plaintiff upon demand of the Indian Commissioner.

The defendant introduced in evidence Exhibit R, a report in 102 pages, giving statistical information of stumpage rates and wholesale prices of lumber at each of the mills in the Klamath District for the years to which their several contracts applied, together with other matters bearing thereon, all in detail. This exhibit was compiled by the Assistant Director of Forestry and the Assistant Forester. It shows that instead of there being any increase in the value of lumber at the mills over the average price for the three years preceding the date of the increase in price, there was a decrease of about \$8 per M feet.

#### *Conclusion of law*

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of \$12,126.39.

50 It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of twelve thousand one hundred twenty-six dollars and thirty-nine cents (\$12,126.39).

#### *Opinion*

GREEN, Judge, delivered the opinion of the court:

In June 1917 the plaintiff executed a written contract for the purchase of timber to be cut by it on the Klamath Indian Reservation. The contract stated that it was made by "the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians" and that the purchaser agreed to pay the value of the timber to "the Superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians." The contract referred to the Klamath Indians as "party of the first part"

and stated that "the party of the first part agrees to sell to the said Lamm Lumber Company," on the conditions stated, certain timber upon a designated area and that the Lamm Lumber Company "agrees to pay to the Superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians," the value of the timber at prices fixed in the manner prescribed by the contract. This contract, which is set out in full in Exhibit A attached to the petition, is referred to in argument as a "tribal" contract. This tribal contract also specified that the sale area included twenty-three allotments as to which the purchaser agreed to enter into separate contracts with the Indians who desired to sell for the purchase of timber on their allotted lands at prices fixed therefor.

The petition is in two counts. The first count alleges that pursuant to the provisions of the tribal contract plaintiff entered into a contract with John Cole, father of one John W. Cole, a minor, and an Indian under the jurisdiction of the Superintendent of the Klamath Indian school, by which John Cole agreed to sell to the plaintiff the timber upon certain land described in the contract which had been allotted to John W. Cole and plaintiff agreed to pay for said timber to the Superintendent of the Klamath

51 Indian school in a manner set out in the contract; and on

August 31, 1918, \$650 was paid to the Superintendent of the Klamath Indian Agency as an advance payment under the contract. On March 2, 1919, John W. Cole died, and the Secretary of the Interior, having determined that his father, John Cole, was sole heir, the United States issued in November 1920 to John Cole a fee simple patent for the land upon which the timber was located which had been sold to the plaintiff as above stated. On March 26, 1921, John Cole and his wife deeded this land to Luke E. Walker and in 1925 a controversy arose between Walker and the plaintiff respecting the right to cut timber on the Cole allotment. About June 1926 Walker commenced suit against the plaintiff to restrain the cutting of timber on the land which had been conveyed to him by John Cole and other land, demanding treble damages. Plaintiff filed an answer to the suit begun by Walker asserting superior title, but on June 18, 1928, a compromise having been effected, a consent judgment was entered against plaintiff in the sum of \$15,000 in favor of Walker and about the same time as a part of the settlement Walker deeded to plaintiff the realty which had been conveyed to him by John Cole and assigned to plaintiff all his interest and title in the proceeds of the timber upon the Cole allotment paid or to be paid by the plaintiff to the Superintendent of the Klamath Reservation. In the meantime, the Superintendent of the Klamath Reservation had been paid the sum of \$12,869.31 for timber cut by plaintiff on the John W. Cole allotment.

After the settlement of the suit begun by Walker, the Superintendent of the Klamath Indian Agency refunded to plaintiff the sum of \$11,189.77, but deducted out of the total amount paid by plaintiff for the timber on the Cole allotment \$650 paid as an advance payment by the plaintiff and \$1,029.54, being 8 per cent of the total amount paid which was retained by the defendant to reimburse it for the expenses incident to administering the contract between the plaintiff and John Cole.

The first count of the petition is based on the allegation that plaintiff paid \$15,000 in settlement of the suit brought against it by Walker under the circumstances above described, that it also paid an attorney's fee of \$1,000 and miscellaneous expense aggregating \$63.75 in effecting the compromise settlement of Walker's suit, making a total of expenditures in connection with its purchase of timber on the Cole allotment of \$1,663.75, and it seeks to recover the difference between the sum repaid by the Superintendent and its total amount of expense in connection with the suit by Walker as above recited. This difference is \$4,873.98 for which sum plaintiff asks judgment.

When the claim set up in the first count of the petition is analyzed in connection with the facts stated therein, it will be seen that it is in the nature of a suit seeking to recover damages by reason of defendant having issued the patent to John Cole through whom Walker acquired title. The defendant sets up several defenses to this count none of which need to be considered unless the evidence establishes that the plaintiff was in fact damaged as a result of the patent having been issued to Cole in the manner above set forth.

It has already been shown that John Cole and his wife deeded this land to Luke E. Walker and thereafter Walker commenced a suit against the plaintiff seeking treble damages for the timber cut from this tract and another parcel of land and for trespass. In plaintiff's argument this suit seems to be treated as if it related solely to the land specified above, but the fact is that the petition in the suit of Walker v. plaintiff was in two counts and while both counts sought to recover treble damages for timber cut and trespass, the first count pertained to an altogether different tract of land from the parcel involved in this suit, and the cause of action set out therein had no connection whatever with the tract conveyed by patent to John Cole upon which Walker in the second count alleged the Lamm Lumber Company had unlawfully cut timber and trespassed. There was also a general allegation at the close of the petition claiming further damages in the sum of \$1,800 independently of the two counts. The total amount of the items of both counts of the petition in the Walker suit and the general allegation was \$5,588.67, the amount claimed on the second count being somewhat larger than stated in the first. The Lamm Lumber

53. Company paid \$15,000 in settlement of the suit begun by Walker and a consent decree was entered thereon on June 18, 1928, reciting that the judgment was rendered for timber cut on the two tracts, describing them separately, and as a determination of all liability of the defendant [Lamm Lumber Company] to the plaintiff [Walker] on account of the various matters recited in the complaint. A few days prior to the payment of the judgment Luke E. Walker deeded to plaintiff the realty theretofore conveyed to Walker by John Cole which was the same realty as was described in the timber contract between John Cole and the plaintiff. This conveyance was made part of the settlement of the suit.

There is no evidence whatever to show how much was paid on the respective counts or that there was any separation thereof in making the settlement. If we were to assume (as we think cannot be properly done) that in the settlement of the case payments were made upon each count in proportion to the amount claimed therein, the amount paid in relation to the timber tract involved will be several thousand dollars less than the sum which plaintiff agreed to pay for the timber thereon. As has been previously shown, the defendant refunded to the Lamm Lumber Company all that it had paid on the timber contract except \$1,679.54. If we can reach any conclusion out of this indefinite state of facts, it is that on the transaction as a whole (including the purchase of the timber, the settlement of the Walker case, and the refund of \$11,189.77 made by the Government) plaintiff made a profit even when its attorney's fees and expenses are included in the cost of the suit.

It may be contended that plaintiff is entitled to recover the \$650 which was not refunded by the defendant on the purchase price of the timber, but we think the transaction with reference to the land in sec. 30, twp. 33 south, range 7 E. W. M., should be considered as a whole in determining whether plaintiff was damaged and that it definitely appears that it was not.

Plaintiff's cause of action on the first count is without merit and will be dismissed.

The action set out in the second count of the petition is begun under the so-called tribal contract. In this count, the plaintiff seeks to recover the amount of an increase prescribed by the Commissioner of Indian Affairs in the price of timber cut above the original contract price. Plaintiff contends that this increase was wrongful and made in violation of the contract.

The tribal contract provided in substance that any advance in stumpage rates to be paid by plaintiff should not exceed fifty per cent of the increase in the average mill run wholesale net value of lumber at mills in Southern Oregon and Northern California during the three years preceding January 1, of the year in which the new prices were fixed. The defendant introduced in evidence Exhibit R,

a report in 102 pages, giving statistical information of stumpage rates and wholesale prices of lumber at each of the mills in the Klamath District for the years to which their several contracts applied together with other matters bearing thereon, all in detail. This exhibit was compiled by the Assistant Director of Forestry and the Assistant Forester. The increase in controversy was made April 1, 1928. This exhibit shows that instead of there being any increase in the value of lumber at the mills over the average price for the three years preceding, there was an actual decrease of about \$3 per M feet. This seems to be virtually conceded by defendant and definitely shows that the Commissioner had no authority to make the increase in the stumpage price by reason of which plaintiff was required to pay in addition \$12,126.39. This matter is considered more at length in the opinion rendered this day in the case of Forest Lumber Co. v. United States, No. L-391, where a similar state of facts (a different period being involved) was presented to this court under the same kind of a contract.

Having reached the conclusion stated above, it is unnecessary to consider the other matters which plaintiff claims show that the increase was not made in accordance with the provisions of the contract. The advance in price not having been authorized by the contract, an implied agreement arose to repay the additional amount collected, unless, as contended by defendant, the contract does not bind the Government in any way and it is not responsible for any act done contrary to the agreements contained therein.

It is urged on behalf of defendant that in making the so-called tribal contract in suit through its officials it was merely acting for the Indians, in their behalf, and for their interest; therefore there was no responsibility on its part for the performance of the contract. In effect the claim is that the defendant, acting through its officials, was merely an agent and that the contract is not a contract of the Government but a contract of the Klamath Indians.

The case is a very peculiar one and we find no authorities directly in point. The contract recited it was made by "the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians," and that the purchaser agreed to pay "the value of the timber to the Superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians." The contract referred to the Klamath Indians as "the party of the first part" which agreed to sell to the plaintiff certain timber and the final agreement was that the plaintiff should pay to the Superintendent of the Klamath Indian School "for the use and benefit of the Klamath Tribe of Indians" the value of the timber at prices fixed in the contract. But that the Government was not the agent of the Indians is clear. An agent is one who acts for another under authority given by the other party. The Government did not act

under any authority given by the Indians. It acted in its own right somewhat in the manner that a guardian might act for a ward. The contract was executed by the Superintendent of the Klamath Indian School by authority of law. In what he did he was acting for the Government, and in what the Government did it was acting under its own rights and powers. It was not authorized by the Indians to make the contract nor was it approved by them; it was approved by the Secretary of the Interior. While the Indians had a beneficial interest in the timber to be cut they lacked power to dispose of it. Any contract made by them would not be binding; and, as it would not be binding upon the Indians, it would not be binding upon the other party and would be merely a nullity. We think that where one who executes a contract acts solely under his own powers and rights he becomes liable thereon although the instrument specifies that it is executed in behalf of and for the benefit of a third party. The fact that a contract is entered into by one party for

56 and on behalf of another party does not necessarily make the contract one of the party who acquired the beneficial interest.

We think the words "in behalf of" and "for the benefit of" were used in the contract under consideration for the purpose of showing that the benefits of the contract accrued to the Klamath Indians and not to the United States. Moreover, if the Government was not responsible on the contract, no one was. It is contended that the Government acted in its sovereign capacity in making the contract. This principle applies in certain cases where damages are alleged to result from laws passed by Congress, approved by the President, and then put in force, but we think the principle has no application here. In one sense the Government did act in its sovereign capacity but it is in the same sense that it acts in making any contract which its sovereign powers authorize it to execute. We think the Government can not be heard to deny its responsibility.

It follows from what has been stated above that the plaintiff is entitled to recover on the second count of the petition the amount of overpayment on the contract resulting from the increase prescribed in 1928. Judgment will be rendered accordingly.

WHALEY, Judge; WILLIAMS, Judge; LITTLETON, Judge; and BOOTH, Chief Justice, concur.

#### V. Judgment

At a Court of Claims held at the City of Washington on the 12th day of January, A. D., 1938, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that plaintiff is entitled to recover.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of twelve thousand one hundred twenty-six dollars and thirty-nine cents (\$12,126.39).

*VI. Proceedings after entry of judgment*

On March 10, 1938, the defendant filed a motion for extension of time to April 13, 1938, within which to file a motion for a new trial.

On March 12, 1938, said motion was allowed by the court.

On April 13, 1938, the defendant filed its motion for a new trial.

On May 2, 1938, the court entered the following order on said motion:

**ORDER**

It is ordered this 2d day of May, 1938, that the defendant's motion for new trial be and the same is overruled.

58 [Clerk's certificate to foregoing transcript omitted in printing.]

## Supreme Court of the United States

*Order allowing certiorari*

Filed October 10, 1938

The petition herein for a writ of certiorari to the Court of Claims is granted. "And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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